DUPLIES

To the PETITION and REPLYES given in to the COMMISSION of PARLIAMENT

For FYNES and FOREFAULTURES;

By *Alexander Munro* of *Bearcrofts*.

THIS Petition being a pretence to an Office *supervacue* contrare to the expreſs Terms of an Act of Parliament, and without payment of a *ſumpere*, and whereof the Petitioner having reaped the profit for ſix years together; He thereafter *freely Renounced* and *Overgave* it in favours of *Hayſtoun*, upon payment of ſeven Thouſand Merks. It is no wonder if the grounds of it be now urged, and debated with as little Reaſon and Argument, as the claim it ſelf was firſt intented with regard to Law and Juſtice, for the Printed Replyes reſume the Defences, and cite the Text of the *Roman Law* with ſo much diſingenuity, making ſuch groſs and affected miſapplications and unreaſonable and illiterate inferences; Firſt, ſetting up a ſhaddow of Fear and Force, and then adduceing a nauſeous volum of impertinent citations againſt it, that it ſeems the Petitioner (who could have replyed much better himſelf) has referred them to ſome of his Lawyers, who had only the advantage to read more Catalogues, and profeſs more Law of deſign to *embroile the caſe*, and to *teach* the Lawyers imployed for the Clerks no other point of *Leaſ-ing*, then to miſtake their Defence by his Example.

It will be needleſs to trouble the *Commiſſion* by repeating here the matter of Fact in the Anſwers, ſeing the Anſwers are in the hands of the Honourable Members, nor is it neceſſar to reſum the Dilator defences, already proponed, but only to add this farder, which may be conſidered as a Dilator, *viz.* That ſince the Petitioner has neither Conſigned nor Offered the price he received, his Lybel ſhould be caſt, and the Defenders not oblieged to Anſwer to it, as was ſolemnly Decided on the 6th of *July* 1543. the Laird of *Waughtons* againſt *Sinclair* of *Steinſtown*, and on the 26th of *June* 1576, *Mackilvain* againſt *Crawford*; And therefore the Defenders ſhall endeavour ſhortly to Duply to what is alleaged in the Reply againſt the perremptor Defences.

Where *imo*: It is denyed, That the Government can diſpoſe of private Mens Rights, for the publick Utility, upon giving the private Party a reaſonable Recompence for their loſs, which was never before denyed by any Doctor, and is allowed by the practice of This and all other Nations, eſpecially as to the Diſpoſing or Regulating of publick Offices; Was not the Office of *Juſtice Depute* ſuppreſſed, and the *Juſticiary* turned in a *Commiſſion*

miſſion to five of the Ordinary Senators of the *Colledge of Juſtice*, when Mr. *William Murray*, and Mr. *John Preſton* had Gifts of the ſaid Office of being *Juſtice Deputes* during life, without alleadging any crime againſt them; or giving them any recompence for their loſs? And twenty other inſtances might be given of the like caſes, even when there was no pretence of any Law againſt the Conſtitution, as there is a clear and poſitive Act of Parliament founded on in this caſe, if it were not deſtroyed by the double Cannon-ſhot at it by the Reply, &c.

1mo. That there is no ſuch Act of Sederunt, nor Act of Parliament; becauſe the Defenders acknowledge, the Record containing the Act of Sederunt is away, and conſequently the Act of Parliament muſt fall, being only relative to the Act of Sederunt; *Et non creditur Referenti niſi conſtiterit de relato.*

This is a ſort of reaſoning unworthy of a *School-boy*, much leſs of a *Doctor of Law*, as the Replier pretends to be: For ſeing the Act of Sederunt ſubſcribed by the whole Lords is extant, the abſtracting of the Record will not make it Null. 2do. *Eſto*, That both the Record, and Act of Sederunt were abſtracted, will that extinguiſh the force of the Act of Parliament, which does not only ratifie the Act of Sederunt, but declares the ſame to have the Force and Authority of an Act of Parliament? and that none may pretend Ignorance; The whole Tenor of it is *verbatim* repeated in the Act of Parliament, and made a part of the ſame.

But the Replyer finding that this would not do the Buſineſs, the Act of Parliament muſt be found Null, by its not being inſert in the Index of the unprinted Acts. Which 1mo. is moſt Irrelevant. 2do. It is moſt falſe, as any that will be at the trouble to read the Index will find.

And as his laſt effort againſt the ſaid Act, he will have it in deſuetude, and preſcrived by an Argument of a piece with the reſt, *viz.* That on the 25 of *July* 1632, Mr *Alexander Gibſon*, and *John Gibſon* his Brother, were preſented conjunct Clerks in one Office, by Sir *John Hamilton* Clerk Regiſter, and accordingly admitted by the Lords; and upon the 1 *June* 1636, Mr *John* and Mr *William Hay* his Son, were preſented conjunct Clerks in one Office by Sir *John Hay* Clerk Regiſter, and accordingly admitted by the Lords, and that ever ſince there has been two Clerks in each Office.

The matter of Fact, as appears by the Record, was, That Mr *Alexander Gibſon* in the 1632 being ſole Clerk; deſigned to have his Brother *John Gibſon* joyned with him, and did dimite the Office in the hands of Sir *John Hamilton*, to the effect he might grant a new Gift in favours of his Brother *John Gibſon* and him, the longeſt liver of the two; which was accordingly done. And in the Year, 1636. Mr *John Hay* and Mr *Alexander Hay* his eldeſt Son being conjunct Clerks, Mr *Alexander* the Son dyed, and Mr *John* the Father makes a Dimiſſion of the Office in the Hands of Sir *John Hay* Clerk Regiſter, for his granting a new Gift in favours of himſelf, and *John Hay* his other Son the longeſt liver, which was accordingly done; Both which Gifts proceed expreſly on the conſent of the Incumbent, in the terms of the Act of Sederunt, and Act of Parliament; and conſequently are very fooliſhly brought in to prove that the ſaids Acts were in deſuetude and preſcribed; And the firſt inſtance that can be given of placing two Clerks in one Office, without the conſent of the

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Incumbent, was in *June* 1649. (when the *English* were invading the Kingdom, and all things in disorder) that Sir *Archibald Johnston* of *Warriston* (the present Mr: *David* and Mr *John Hays* conjunct Clerks in one Office; And to infer by that single instance, That the Act of Parliament was in desuetude, or that it did prescrive betwixt the 1649. and 1661. or 1669, argues more Confidence than Judgement; So that the great foundation of the Reply, *viz.* That the Act of Sederunt and the Act of Parliament were in desuetude, and prescrived, falling, all the Superstructer must fall in consequence, and the *Kings Letter appointing the Clerks to be regulate according to the saids Acts*, will not import Injustice, much less Concussion.

The *Learned Author* of the Reply is in a mistake, to pretend that the Answerer alleadged, the Lord *Tarbat* was the first that procured a Libertie to admit more Clerks then one in each Office; For all along its acknowledged, That Sir *Archibald Primrosses* Gift did likewise import that Liberty; But all that is contended is, That the Lord *Tarbat* was the first that did exercise that Liberty according to Law *viz.* By conjoyning only upon the express consent of the Incumbents in the Office; For, if the Register might conjoin one without consent, there can no rational ground be given why he might not conjoin three or four in each Office: So that the cause of Deputing one or more in each Office, will either run too farr, or must be regulat by the Act of Parliament, and the Interest and Conveniency of Lieges, of which the Lords of Session are the only proper Judges. And it is hoped it will not be pleaded, That *the King could dispense with the Acts of Parliament*; And the reason why the Lords of Session did think it convenient, that there should be no more then one Clerk in one office, unless the other Clerk were brought in at the Desire, and with the Consent of the Incumbent, was by reason of the prejudice that the Liedges might sustain through the delay it might occasion in the dispatch of Justice, by the Debates and Quarrellings that might arise betwixt two Clerks in one Office; that were not in a good understanding together, whereof the Petitioner is a *living Instance*.

It is then apparent that His Majesties Letter being conform to the standing Law of the Kingdom, neither it, nor the Act of Sederunt following thereupon, can import any injustice as to the Petitioner; But on the contrair, Mr *John Hay* had better ground to alleadge, That the Lords sentence, *appointing him to pay* 7000 *Merks*, was unjust, seing the Petitioner was imposed upon him contrair to Law; then the Petitioner has to alleadge that the 7000 Merks was not a reasonable Composition, being more than ever before that time was payed for any of these Imployments. And the vast difference betwixt *Tarbat* his bringing in of Conjuncts in each Office, and Sir *Archibald Primrose* his bringing them in does clearly appear, in that the one was done in the expres terms of the Act of Parliament, and conform to Law; and the other expresly contrair to Law, which was fully considered by the Parliament 1685, wherein what *Tarbat* did, was approven and ratified, not in course, but by a special Act of *Parliament*, which is not *Declaratorie*, but is *Statutory*, and yet not *Derogatory* from the Act 1621; for as the Act 1621, allowes only one Clerk in each Office, without consent of the Incumbent; so the Act 1685, allowes only of two with consent; and so secures that the Register should not be able to bring in more then two in each Office, albeit he should procure the Incumbents consent, which seemed to be unclear by the Act 1621.

To the second Defence, on the Brocard, That in *dubio melior est causa possidentis*, It is Replyed, That the Petitioner in point of Right was *prior tempore*, and therefore *potior jure*; And that the possession of the present Clerks can avail them nothing, in respect of the violent way that the Petitioner *desiit possidere*.

To which it is Duplyed, That it is true *ceteris paribus qui prior est tempore potior est jure*; But in this case (tho there were no such thing as the Act of Parliament), the advantage of the possession would make the difference, and preferr the Clerks; And the Law does indeed provide, That *qui dolo desiit possidere*, cannot thereby better his own case, which may be the Petitioners; but unless it could be proven that the Clerkship were not in *commercio*, or had *vitium rei furtivæ*, this advantage must by Law follow the possession, that doubtless preferrs the Possessor; And it is observable, that albeit by the Law of the twelve Tables *rei furtivæ æterna fuit auctoritas*; Yet the *Prætorian* Law in the Edict, *quod metus causa*, neither did nor could extend *in rebus metus causa gestis*, such a *vitium reale*, for ever nor against all singular Successors; and supposing there had been just cause of fear in this case, as there could be none, it were but an unjust wreasting of the *Roman Law*, to the plain prejudice of the Clerks, to give the Petitioner the benefit of that Edict, the effect of which against singular Successors was at first but Annual, ending with every Prætor's Authority, and thereafter endured no longer, even *in rebus immobilibus*, then for the Ten years of the *Roman Præscription*, and to refuse the Clerks, the benefit of that Ten Years Præscription, which (considering that their Rights have been *bona fide* acquired, and possest be them and their Authors for *fourteen Years* together, without a shaddow of interruption); would settle and secure the same according to the *Roman Law*, beyond all possible controversie.

The third defence founded on the recording of his *Majesties Letter*, the Clerks consent, and all these publick Acts of Sederunt, and Parliament mentioned therein; and the Petitioners so long acquiescence and not quarelling the same, meets with no other Reply then that it is a quible on the *l. gesta: cod: de re jud:* to apply it to any other thing then to the Testimonies and Depositions of Parties and Witnesses, and that the recording any Transaction or Matter in it self defective cannot supply its defects.

To which it is Duplyed, that it would appear the Replyers common sense in Applying of that Law goes no farder then his Glos's and Commentars led him, otherways he could not oversee the Import of the word (*Gestum*) in his so much boasted Edict, *Quod metus causa gestum est, &c.* And the *ll:* 19. and 58. *ff. de verb signif.* Are the best Commentars for the meaning of that word, which make it to signifie any Deed that can be the foundation of a Right; and it was not reasonable to think, that the recording Depositions of Parties, and Witnesses should interess the publick Faith more, or put singular Successors in greater security in Relation to the subject matter of such Depositions, then the Recording publick Rescripts of Princes, and solemn Acts of Sederunt, and Acts of Parliament should do in Relation to what is defined and enacted thereby. And albeit the *Discharge* and *Renunciation* to *Hayston*, on payment of so considerable a Sum, be the likest thing of any to a Transaction; yet it is hoped that the KING's Letter for executing the Law, the express and judicial consent of the three Clerks who had then the sole Right, and the several Acts

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of Sederunt Recorded, and whereupon the Clerks Rights are founded, will not be found matters in themselves defective; and tho' they should, the two Acts of Parliament cannot. So that without the highest Violation of the publick Faith, that can be made to reflect to private Rights, and most unjust Derogation, to the uncontraverted Law of the Kingdom, there can be no question of the Rights of the present Clerks to their respective Offices, which were bought as dear, and have as many clear and solemn Laws for their Security, as any so much property within the Nation.

To Elide the *4th* and *5th* Defences, founded upon the *Homologation* and *Acquiescence*. There is a forced Bogle of a *Concussion* pretended, and a laborious Collection of Citations thrown in, as if the antiquated Name of *Caldas* were as useful in Lawyers debates to perswade the wisdom of the Nation; as the *Jargon* of *Albion Gresham*, and the like; is to raise the value of that precious *Drugge*; But because all, or most of the Citations, do not at all serve to clear, that there was any Fear or Concussion in this Case, and only prove that Deeds extorted by Force and Fear, are reduceable in Law, which is not the question; And likewayes, that the Replyer pretending to explain the true causes and effects of Fear has after his manner wandered far from these Causes of Fear, which the Law has fixed &c. Therefore passing these Citations which concern not the question, let the Legal Causes of that *Justus Metus*, which by the Roman Law, gave the Benefit of Restitution be considered, as they are defined by the Text it self, which is so clear, that it leaves no ground of debate, and plainly excludes the Petitioner's Case; For the *l:* 3: and what follows in the Title *ff: Quod metus causa, &c.* Determines concerning the just causes of Fear in these words: *Continet igitur hæc clausula & vim & metum, & si quis vi compulsus aliquid fecit per hoc edictum restituitur.* §: 1. *sed vim accipimus atrocem, & eam quæ adversus bonos mores fiat, non eam quam Magistratus recte intulit, scilicet jure licito, & jure honoris quem sustinet.* (which is the very Case) *Cæterum si per injuriam quid fecit populo Romano, Magistratui vel Provinciæ Præses.* Pomponius *scripsit hoc edictum locum habere, si forte inquit mortis vel verberum terrore pecuniam alicui extorserit.* l: 4: *Ego putoetiam servitutis timorem simulumque admittendum.* l: 5: *Metum accipiendum* Labeo *dicit non quemlibet timorem, sed majoris malitatis.* l: 6. *Metum autem non vani hominis, sed qui merito, & in hominem constantissimum cadat ad hoc Edictum pertinere dicemus.* l: 7. *Nec timorem infamiæ hoc Edicto contineri,* Pædius *dicit, neque alicujus vexationis timorem per hoc edictum restitui, proinde si quis meticulosus rem nullam frustra timuerit per hoc edictum non restituitur quoniam neque vi neque metus causa factum est, proinde si quis in furto vel adulterio deprehensus, vel in alio flagitio, vel dedit aliquid, vel se obligavit.* Pomponius *recte scribit, posse eum ad hoc edictum pertinere, timuit enim, vel mortem, vel vincula.* l: 8: §. 2. *Quod si dederit ne stuprum patiatur Vir seu Mulier, hoc edictum locum habet, cum Viris bonis iste metus major quam mortis esse debet.* l: 9. *Metum autem presentem accipere debemus, non suspicionem inferendi ejus* (as might have been in this Case) Et *ita* Pompomus *scribit, Ait enim metum illatum accipiendum, id est, Si illatus est timor ab aliquo denique tractat, si fundum meum dereliquero audito quod quis cum armis veniret, an huic edicto locus sit, & refert* Labeonem *existimare edicto locum non esse & unde vi interdictum cessare, quoniam non videor vi dejectus qui dejici non expectavi sed profugi.* And Cujacius on the said L: 7i defines in so many words, *Non quilibet metus causam*

causam dat Edicto, sed mortis aut verberum, aut vinculorum, aut servitutis, aut stupri ex quo animus consternatur; And *Antonius Faber ad dictam, L*: 9: is of the same opinion, if the Authoritie of these two may be compared with that of the Replyer, and the same *Faber, ad l*: *ult*: *Eod*: is positive, *quod facto opus est, & quidem atroci & majoris malitiæ ad hoc ut vis ficta vel metus illatus dici possit.* By all which it is clear as Light, that the *Romans Law* gave Restitution against no other fear than that of Death, Scourging, Fetters, Slavery, and Ravishing; And it will be as clear, That the Petitioner could be under no just fear of any of these, if it be considered; *1mo*, That albeit his *Majesties Letter* had made particular mention of him, and his Office, and that he had never so good Right to it; Yet in that case, the loss of his Office was no just cause of Fear, so as to infer Restitution against the Renounciations How much less? when in that Letter he was not so much as named. And if neither the fear of Infamy, nor of any other Vexation, fell under the Edict, as a *justus metus*, which is expresly defined in the above Text, it is not intelligible how the parting with an illegal pretence, to an Office that cost him nothing, and for no less than Seven Thousand Merks, can be reckoned a just cause of Fear; in the Petitioner, occasioned by a Letter, wherein there is not so much as one word of him. *2do*: Albeit the Letter had contained a threatning of his Majesties displeasure against such persons as the Lords should think fit to remove, if they should refuse either to remove, or accept of the Modification; Yet that could infer no Restitution on the Edict, *quod metus causa, non metuum non jactationibus tantum vel contestationibus, sed atrocitate facti probari convenit*; *l*: 9: *cod*: *de his qui vi*. *3tio*: As his Majesty, and the Lords in this case, shewed no: the least disrespect to any of these persons who were removed at that time; so it is impossible *per rerum naturam*, that they could have designed either by that Letter, or Act of Sederunt, any other thing then their Removal, and the observing of the Act of Parliament, there being no manner of Certification adjected, in case of their not accepting the Modification; So that no confidence short of the Petitioners, could obtrude such a groundless pretext of Fear, to which he is able to give no other foundation then his own meer conjectures anent his Majesties displeasure, to convell so lucrative and voluntar a transaction on his part; And after fourteen years silence to quarrel singular Successors, for most Onerous Cause, in their Rights to an Office, so solemnly secured to them, and their Authors both by the publick Law, and his own private Paction.

The first of the two Texts, which were thought fit to be cited in the Replyes, Is in *l*: 6: §, 7: *ff*: *de acquir*: *vel omit*: *hæred*: *cum qui metu verborum vel aliquo timore coactus fatens adierit hæreditatem sive liber sit, hæredem non fieri placet sive servus sit dominum hæredem non facere.*

To this it is Duplyed. 1*mo*. That the *Aditio Hæreditatis*, being the engaging a Person in an Affair, which of its own Nature is of the greatest import, and the most involved that is known in Law, since it is almost Impossible for any Man to know distinctlie the *Universum jus, Quod defunctus habuit*, before he enter Heir, and for which cause the *dies Cretionis*, and *Annus Deliberandi*, were introduced to lessen that danger; it is therefore most probable that the *Romans* were more prone and readie to allow Restitution against the *Aditio Hæreditatis*, and upon more slender Grounds then against any other Obligation in their Law, and it is certain that in our Decisions the Lords do frequentlie sustaine defences to

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Elide an Odious passive Title, which they would repell in other cases; for the whole context of the Civil Law, anent the Edict, *Quod metus causa* makes that paragraph altogether excentrick and Irregular. But 2do. the great *Cujace*; whom never Man after *Justinian's* time equaled in the knowledge of the *Roman* Law, was so conscious to the absolute inconsistency of this Text, with the whole Titles, *Quod metus causa* borh in the *digest: & Cod.* That he is forced in his Comenter, *ad l: 21. §: 5. Digestis Quod metus causa* to correct it, and in stead of *Verberum* to Read it *Verberum*; For (says he) *metus est justorum & sredicimus metum verberum qui justus est, metus non verborum*: So that this Text being thus restored will not meet the case; seing if the *aliquo timore*, which follows the word *verberum* be not likewise corrupted, it must be understood *habili modo*, & necessarly supposed to be always a *justus timor, scilicet ex justa causa*; and it is pleasant to take notice that the Replyer could not find one single *grue* in all the Bodie of the Civill Law, which could be wreasted so much to favour the Petitioners case save this corrupt Text only, and yet tho it were sincere, as it cannot be; He could not subsume in the terms of it, neither the King nor the Lords having by Word or Write threatned the Petitioner to accept of the Money or to grant the *Renunciation*.

The other Citation is the *l: 11. Cod. de his qua vi*, &c. *Si per impressionem quis aliquem metuens saltem in mediocri officio constitutum rei sue in eadem provincia, vel loco ubi ale officium peragit, sub venditionis titulo fecerit Cessionem quod emptum fuit reddatur.* Upon which Text the Replyer most insipidly subsums, That in the Petitioners case, there was *aliquis metus*, for a Child would have adverted that the word *aliquem* in the Text, could not construe with *impressionem*, and did refer only to the Concussor, and he is pleased to add that the Petitioner could not have disobeyed the Kings command in his Letter, without the hazard of being constructed a seditious Contemner of Authority; so that his taking the Money was an Act of necessity.

It is Replyed, That the Impression mentioned, there behoved to have been a just one from a sufficient Cause; And albeit in this Text, which is acknowledged to be *sincere*, the word *aliquem* had been written *aliquam*, as the Replyer would have it: Yet the Law even in that case would regulate the Extent of that general Terme, and restrict it only to a just impression, the causes of which are fixed and known in Law; And as it is evident from the Causes of Just Fear defined in the Text, as well as from the *l: 10: cod: hoc tit:* in these words, *accusationis instituta vel future metu alienationem seu promissionem factam rescindi postulantis improbum est desiderium.* That the hazard of being constructed a seditious Contemner of Authority was no cause of fear, to which the *Roman Law* would allow the benefit of the Edict, unless he should thereby have run the hazard of being truly guilty of *Sedition*: So it is gross to alleadge that the Kings Letter bears a command to the Petitioner for accepting of Money, or Relates to him otherwise then as the Lords of Session should find just to apply it; but in this case there is no difficulty to understand that the Petitioner was abundantly secure from the hazard of contemning Authority, by his forbearing to intrude any more upon that Office, and suffering the Act of Parliament to be put to execution, whether he had accepted of Money for so doing, or granted any such Renounciation or not.

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By all which it is plain, that none of these Citations that are adduced out of *Baldus*, *Ancheranus*, *Fulgosius*, *Geminus*, *Pappus*: *Caldas*, *Natta*, *Alexander*, *Arretinus*, *Mo-nochius*, and *Bartolus* are to the purpose; And in the case the Lady *Grey* against the *Earl* of *Lauderdale*, the Right transmitted by the Lady, was a Legal Right consistent with Law, the Concussor was called and insisted against, and there were Acts of Force and Violence lybelled and proven; such as that the Earl violently entred to the possession of these Lands, disponed before any sentence in his Favours or Right made to him be the Lady. Whereas in this Case, tho' the Petitioner's Right had not been null by the Act of Parliament; yet there was no Force or Violence done for removing him, much less was he any wayes compelled to accept of Money, or give such an express Renunciation of his Right; and if he had been intimidate by the Lords to accept of the Money, as he was not; yet a Receipt of the seven Thousand Merks, had answered the Termes of the Act of Sederunt, by which he is not at all ordained to Renunce: And he might upon offering to consigne such a Receipt without the *Renunciation*, have oblieged *Heysom* to pay the Sum by a Charge on the Act of Sederunt, upon which, albeit it be plainly and positively urged, that on the other Hand no manner of Execution could have followed against the Petitioner, if he had not voluntarly both given Obedience and Renunced; yet nevertheless, there is no Reply made to this, but that in those days he durst not offer to repossess himself of his Office, as it is humbly conceived he dare not now a-dayes, albeit he might then as well as now, refuse or accept Money, and grant Renunciations or not, as he thought fit.

The second Allegeance against the *Concussion*, That the Lords had no Interest to concuss, gets no better Reply; For to say the KING concussed, especially in an Affair where in the Petitioner's particular Interest was not considered, and which might have taken full effect without his accepting of Money, and all without his giving any such Renunciation, does not at all take it off, and therefore needs no farther Duply.

To the thrid on the special Case of singular Successors. It is Replyed, That the Action of Restitution competent to the Party læsed, is in *Rem scripta*, and follows the thing extorted, whatever *Bona Fides* the possessor had in the acquisition.

It is Duplyed, That this Allegiance does not grant, but only suppose the Concussion; and if the Replyer had been ingenuous enough in citing the Law, it had cleared the point: For when in his Reply to the Dilators, he cites, *l*: 14: §: 3. *ff*, *quod met. causa*. After the words; *In hac actione non quæritur utrum is qui convinitur an alius metum fecit, sufficit enim hoc docere metum sibi illatum esse*. He industriously suppresses these which immediatly follow, *Et ex hac re eum qui convenitur etsi crimine caret lucrum tamen sensisse*. Which words do not only quite exclude this Case from falling under that edict, seing the Clerks have their Offices for most Onerous Causes, as is notour to all concerned, and so cannot in Law be said *Lucrum sensisse*; But likewayes these words must secure all such singular Successors from the Avarice of evil Men, whose pretences they could not possibly obviat, and what is said before to enforce the second Defence, as to the difference of *res furtiva*, and *metu gesta*, in relation to singular Successors is here repeated, tho' it be sufficiently cleared by what is already said, That the Petitioner was under no Impression whereof the Law takes notice.

Whereas it is Replyed, to the *4th*: Allegiance, That the Renounciation being granted

while

while the King who signed that Letter was in life, And the Petitioner within his reach; The Renounciation ought in Law to be looked on as an effect of the same continued Vive and Force, whereby he was removed; And the same as if Robbers had plundered him of an hundred pounds, and offered back ten on his Discharge of the whole, in which case the Discharge could not hinder Restitution.

It is Duplyed, 1mo: Although the Letter had expresly commanded him, to remove from his Office, yet unless it had adjected a certification of Death, or an ot other of the above effects of the *vis anex*, defined in the Text, it could import none of the Legal and fixt causes of *justus metus*; But its far otherwise, and that Letter is intended and conceived in such terms, as could not possible fright any Rational Man; And it is not in the least questioned, but the Petitioner (if he had not been conscious to the nullity of his Gift, as being grounded on that dispensing clause, in expres contradiction to the Act of Parliament, and constitution mentioned in that Letter) he would have refused to accept of the money, and without delay would have applyed to the King, to be reponed, who as the Petitioner remembers, looked on him for that time as a very Loyal Subject, and wanted but such an occasion to reward their Faithful Service he constantly rendred to him during the *English* Usurpation. But 2do: The Letter and Act of Sederunt were sufficiently obtempered by his removing; and if he was thereby bound to give a Receipt to Hoyston on payment of the Seven Thousand Merks; which is not unquestionable, yet it is plain beyond all contradiction, that there was no necessity from that Letter, or the Act following upon it, either for his accepting of the Money; or after he had taken it for his granting so positive and ample a Renounciation in terms sufficient, both to Denude himself, and to transmit his pretence in favours of others; tho the Letter and Act of Sederunt had left his pretended Right as entire as it was at the first granting of it; and as to the ungentle parallel of the Robbers, there are so many disparities, and so palpable, that it merits no more Particular answer then that the Petitioner is not in the case of the Edict, and tho he were, the difference in Law betwixt *Res metu gesta* and *res furtivæ* betwixt singullar sucessors for most onerous Causes, and Robbers need not be insisted upon.

The Replyer ends with a Reflection on the Wrongs commited in the latter Reigns, as if the dispensing clause in Sir *Archibald Primroses* Gift, and be vertue whereof he appointed six Clerks of Session, in manifest contempt of the Act of Parliament, were not one of the most pregnant instances, though nor the most important, that can be observed of that Nature, since the Restoration of the Monarchy; and was a wrong done not to a single Person only, but to that intire Fraternity, & the making a preparative to break that Imployment and thereby occasion the greatest disorders in the Administration of Justice in all time thereafter, if the Regisiters thought fit to constitut as many Clerks of Session as the Secretaries of State are in use to admit Writers to the Signet, which they might very well have done by vertue of that Clause, if the King could have thereby dispensed with the Act of Parliament, 1621. Although it be but consonant to the Modesty of the Replyer to obtrude that the Kings letter for Executing the Act of Parliament was an act of Tyrrany; and yet

that

that Clauſe was a deed of legall Adminiſtration becauſe it is the Foundation of the Petitioners pretended Right who does very much diſparage the ſufferings of theſe Perſons in whoſe favours Their MAJESTIES and the ESTATES paſt the Act of Parliament, for Reſcinding Fynes and Forefaulturers, by ſo Whinning a Compariſon of the merits of his cauſe; for tho his MAJESTIES Commiſſioner had not in plain Parliament Ordered the Petitioners Caſe to be Expunged out of that Act, it is very well known that he never ſuffered the leaſt inconveniencie *for Conſcience ſake*; Nor will any Man who has not *darkned that Light by Self-love and Avarice, pretend to an Offer*; which after he enjoyed for ſeveral years without paying a Groat for it; He then Renounced upon Receipt of *Seven Thouſand Merks*; And knows very well that the preſent Clerks, whom he would now *Rob of it*, did purchaſe it *bona fide, for a greater Sum*; And whereof (if he ſhould prevail) they have no Action competent to them for Recovery of a Sixpence.

In Reſpect whereof, The deſire of the Petition ought to be Refuſed, and the Petitioner condemned in ſuch Expenſes as the Honourable Lords and other Members of the Commiſſion of Parliament, *ſhall find juſt.*

THE

THE VISCOUNT OF TARBAT

Being Cited INCIDENTER in the Action betwixt *Alexander Monro*, and the Clerks of the SESSION; Does humbly Offer what followes to be Conſidered by the Right Honourable COMMISSION of PARLIAMENT.

BY The expreſs ſtanding Statutes, the Clerk Regiſter's Deputes for *Parliament* and *Seſſion*, are reſtricted to the number of Three. The Law prohibites the Clerk Regiſter to commiſſionat any more; or to adjoine any to theſe Three, without expreſs conſent of the other Principal to whom any ſhall be adjoined.

Some three or four times, one deſires of the Principals; one has been adjoined to the Deſirer before the year 1640, and this was conſonant to Law. But Sir *Archibald Primroſe* caſts in a Clauſe in his Commiſſion allowing him to joine one or more in theſe Offices, as ſhould be found conducing to the good of the Leidges; and on this warrand joins one to every one of the Three Offices, ratifies their Gifts in Parliament, and they ſerve in Seſſion; but without asking or getting any expreſs conſent of the other Three, as the Law does *ſpecifickly* require; and amongſt others, Mr *Monro* is adjoined to Mr *John Hay Gratis*.

Anno 1764, The KING being informed, that this was againſt Law, and (as ſome ſaid) inconvenient, He by a Royal Letter to the Seſſion, as a juſt Executor of the Law, requires the Lords to reduce theſe Offices to their lawful Conſtitution and Number; But according to His *Clement Nature*, did alſo preſcribe, that theſe who in conſo-

nancy

nancy to Law were to be removed, ſhould have a Gratification given by the other who was to remain in each Office, at ſuch a rate, as the ſupreme Judicature of the Nation ſhould judge fit: The Seſſion giving dutiful Obedience to the Royal Will, in reducing this matter to the Rule of the Law; They modifie no leſs, then the full of what was by cuſtom payed for ſuch an Adjuncts Office at, or before that time; *viz.* 7000 *Merks* to each.

There is no doubt theſe who were judged fitteſt to be removed, would rather have kept their illegal poſſeſſion, then take this ſum: But they could not but think their removal was ordered with *Clemencie*, when as by Law, they might have been ſet off from their illegal Poſſeſſion without the reimburſment of their inconſiderable Advance; yet to be re-imburſed of it, and enjoy their gain whilſt they poſſeſt, tho to the *Leſion* of the other Clerks, on whom they were intruded, and accordingly they went off in acquieſcence.

But if two who bought their Office did ſo, how well ſatisfied ſhould *Mr: Monro* have been, who not only entered illegally, and more illegally than the other two; but alſo *gratis*? And albeit he would rather have kept the Office, yet he ſhewed full acquieſcence; 1. By uſing no Proteſtation nor interpellation to the ſentence; 2. By homologating it, in receiving the Price. 3. By a *Legal Diſpoſition of all ſuch Right & Title as he had, to another.* And 4 by acquieſcing for 14 years in this tranſaction. And 5 by a voluntar exercing another Office in that very Court, inconſiſtent with his being a Clerk. *viz.* Of an Advocate without Proteſtation or Inſinuation, that he had ſo much as any pretence or an eye to the Clerkſhip. One who were not verſed in the Novel of Mr *Monro's* Replyes, and knew nothing but *Law* and Reaſon, would think that if there was Injury done to any in all this Affair, it was to Mr *John Hay*, on whoſe Office Mr *Monro* was obtruded; And when the KING reſtored him to his Right, that yet he behoved to pay for this Juſtice, and to one who had no legal Tittle to it, and who gave nothing for it; had Mr *Monro* ſo much of pretence, it had ſav'd his *Lawyers* the ex-

expences of a great deal of miſtake, both in *citation and application of Laws*

However Mr *Hay* goes from the Office, Sir *Thomas Murray* being Clerk Regiſter, what ſhould now be done? A Clerk is neceſſar for the Kingdom, and exerciſe of Juſtice; Mr *Monro* puts in no claime on his notable Tittle, and I dare ſay, Sir *Thomas Murray* did not gueſs that he could not place one in that Office, without hazard of being a *Concuſſor*, a *Robber*, or ſome other of the Replyer's *Epithets*. In the name of ſport, the Clerks place muſt vaik till Mr *Monro* think fitto deſire it, or until he ſit down in his Chair: Sir *Thomas* did not know this Obligation, he Commiſſionates another whom he and the Seſſion judged fit, and receives a good deed for it *viz.* 100 Pieces more then Mr *John Hay* did give for the half of it to Mr *Monro*. He ſerves the Leidges, but what's payed him for his Service? He muſt by this New Natured Logick, pay it in to Mr *Monro* who Served none, Interpelled none, and Exerced two other lucrative Imployments at the time, inconſiſtent with this Service of a Clerk: And not only ſo, but to the as good, he muſt remove and yield his Place to Mr *Monro*, I hope under the pain of Quadruple: For ſo the Edict preſcribes againſt the unwilling Reſtorer; and no doubt, the now Clerks are not frank to Reſtore haſtily.

Well, *Tarbat* as the Replyer doth ſhortly call him, comes thereafter to be Clerk Regiſter, and in his time Actions were multiplyed, and it was judged by many not unfit that there ſhould be two in every Office. *Tarbat* adviſes it, and finds the Judges of this Opinion, He Repreſents it to the King, who gives his Conſent, but ſo as by a Letter, to lay it before the *ſupreme Judicature*, who found that becauſe of the ſtanding Law this could not be done without the conſent of the Three who were in Office, and they conſenting, Three were adjoyned.

Tarbat did not by Vertue of a Clauſe contrair to a ſtanding Act of Parliament, take a Liberty to add one or more in theſe Offices; But *Tarbat* according to the Law, did add one to each, with the

the consent of him, to whom he was added; And whereas the Clause creept in to the Clerk Registers Commissions was no narrower than to allow him to add one or more, *Tarbat* did take care in the Act of Parliament 1685, That *the power of Adding, tho with consent, should not exceed one of Addition*; And all this while *Tarbat* can Declare, he never heard or thought of Mr. *Monro* as pretending to be a Principal or Adjunct.

Now, How comes *Tarbat* to be called or concerned in this Process? if it be for Restitution of what was payed to him, in case of Eviction; he protests to be heard against that in time convenient, since on hitherto uncontraverted grounds of Law, he will make it evident, that *non tenetur de evictione*, of what he got, *quatenus in officio*; and that against the Repetition when urged.

But he presumes it Legally impossible, That Deputes can be in the least hazard from so wild a Claim, not only not founded but oppolite to all Law, Justice, and Reason. And is far from doubting, That the Right Honourable Court of Parliament, will take severe Animadversion of so scandalous and calumnious Plea's; which indeed as much as in the Pretender lyes, reflects as far on the Justice of that Court, as can possibly be done, by bringing ridiculous Claims to vex the Leiges; As if that High Court could not soon discern what every Person of common sense, cannot but discern; As to which Lybel and Replyes so full of the darkest mistakes of Law, and Lawyers, and so stuft with *Paralogisms* in *Law*, and *Solecisms* in *Grammar*; He will make no Answer, that being with far more Learning, nor is proportionable, fully made by the Clerks in their Answers, and Duplies to the Petition and Replies. And albeit he knows himself not reachable in the particular; yet your Lordships will, I hope, allow him to expostulat for redress against such Injuries, to Subjects, to Laws, and to our *Soveraignes*; For as to our selves perhaps Record cannot instance so calumnious a Plea. Sometimes the Adversaries gives their Action the name of *Concussion*, another time of *Quod metus causa*; and

so furth

ſofurth. I may ſay with *Cato in Saluſt. Jam pridem equidem nos vera rerum vocabula amiſimus*, If there was Concuſſion? will the Poſſeſſor *ſine crimine* be decerned againſt, before a Concuſſion be proved? And can a Concuſſion be proved Judicially, without ſo much as citing a Concuſſor? For they are not yet ſo ridiculous, as to alleage that the now Clerks were the Concuſſors: Well, if they miſs of a Concuſſion, it muſt be found reduceable *ex capite metus*; But where is the Violence? not ſo much as one threat alleaged to dimit the Office, no, not a Legal Execution, nor poſſibility of one to force an Homologation: And yet both Dimiſſion, Diſpoſition, and Homologation, ſo voluntarly granted without a ſhaddow of Coaction, muſt be reduced *ex capite metus*: Is not this unparellel'd calumnie, and ridiculing of our Laws, intollerablie! But to make up all, Concuſſion, Violence, Robbery; And all the **Black Names** is ſum'd up at laſt, by the Replyer, in this. **It was done by the Letter of a King,** who becauſe he writes to his Senate, to Reduce Enormities and illegal Invaſions of Rights, to, and according to the Standing Laws, and that by no *extrajudicial Edict*, nor new *erected Court*, nor *extraordinary Commiſſion*, but by the *Ordinar Supreme*, and *beſt loved Court of the Nation*: So far from ſhewing Anger at the Perſons; that in Rectifying the wrong, he gratifies them by Reward, rather than Puniſhment; And ſo far from Threats, that Gentler Expreſſions could not be Adapted, to excuſe the faults of a Child, than was uſed by this *Father of the Country* to theſe tranſgreſſors of his Law; But this is treated with no more Civil Name, then *Concuſſion*; And in plain Terms a KING! for ſo *Juſt*, ſo *Clement*, ſo *moderate*, ſo *beneficial execution of the Juſt Laws*, is branded with the expreſs Character of a **Concuſſor**, a **Robber**, a **Tyrant**! which touching ſo rudely on the *lawful exerciſe of the Soveraign Power*, as not only to Defame a late *Glorious King*, Uncle to both Their MAJESTIES; But with a moſt Criminal Inſolence, to **Pannel Kingſhip**! And to Attacque the *Monarchie* in its moſt Eminent Rights. Therefore to conclude, The *Viſcount of Tarbat*, Does Humbly Intreat Your Lordſhips,

This, to consider this Invasion of the *Royal Honour* and *Power*, as a matter worthie of Your Notice; And Desires that no Progress be made in this matter, which wholly depends on the *Kings Soveraign Power*; And the Execution thereof until His *Majesty* be informed of the nature of this pursute, wherein His Honour, and the *Right of the Crown* is so deeply concerned. And Humbly Offers, and Proposes as a Subject, a Peer, and a Member of Parliament, That His *Majesties* Advocate, Solicitor, or their *Substitutes*, may be consulted in so high a point; And that inquiry be made for the Authors of this scandalous, Criminal Lybell; And further, Humbly Offers to Yours Lordships Consideration, if the Cause do not require, that the Authors and Spreaders be secured, untill His *Majesties* Pleasure be known herein.